No. 91-274
No. 91-261

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Supreme Court of the United States

October Term, 1991

MASSACHUSETTS WATER RESOURCES AUTHORITY, KAISER ENGINEERS, INC. and BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,

Petitioners,

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., *ET AL.*,

Respondents.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief of Amici Curiae National Constructors Association and Bechtel Corporation/Parsons Brinckerhoff, Quade & Douglas, Inc.

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(S1343—CVR-517)

CONSENT OF THE PARTIES

Counsel of record for petitioners and respondents in this action have consented to the filing of this amici brief and their written consent is filed concurrently herewith.

QUESTIONS PRESENTED

Amici adopt the Questions Presented set forth in the petitions for Writ of Certiorari.

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BRIEF OF AMICI CURIAE NATIONAL CONSTRUCTORS ASSOCIATION AND BECHTEL CORPORATION/PARSONS BRINCKERHOFF, QUADE & DOUGLAS, INC.

DESCRIPTION OF INTEREST OF AMICI CURIAE

The National Constructors Association ("NCA") is a not-for-profit organization comprised of the nation's largest, unionized construction companies.[1] As a group, NCA's members are involved in numerous, on-going construction projects across the country involving billions and billions of dollars. In addition to working on the nation's largest private sector construction projects, NCA members also regularly work on the nation's largest public construction projects on behalf of federal, state, and municipal governments.

NCA member companies are all "employers engaged primarily in the building and construction industry" within the meaning of the National Labor Relations Act, 29 U.S.C. §§151 *et seq.* (the "Act"). As such, NCA's members have been given important rights by Congress that are explicitly set forth in Sections 8(e) and (f) of the Act, 29 U.S.C. §§158(e) and (f). These NCA members regularly rely on these rights in negotiating project labor agreements that bind all contractors performing work on a project. These rights—as they apply to governmental projects—have been eviscerated by the decision below.

Bechtel Corporation/Parsons Brinckerhoff, Quade & Douglas, Inc. ("Bechtel/Parsons") is a joint venture and is the Construction Manager retained by the Massachusetts Department of Public Works (the "MDPW") to manage its Central Artery/Third Harbor Tunnel Project (the "Artery project"). The Artery project is one of the largest and most

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[1]NCA members include: ABB-CE Services, Inc., ABB Lummus Construction Company, The Austin Company, Badger America Inc., Bechtel Construction Company, Oscar J. Boldt Construction Company, Ebasco Constructors, Inc., Fluor Constructors International Inc., Kiewit Industrial Co., Leonard Construction Company, Parsons Constructors, Inc., The Rust Engineering Company, Stone & Webster Engineering Corporation, UE&C Catalytic, Inc., and Wright Schuchart Harbor Co.

complicated construction projects ever undertaken in this country. Its estimated cost will exceed four billion dollars and it will take approximately eight or more years to complete. The Artery project will include major improvements and expansion of two interconnecting Interstate highway systems (I-90 and I-91); construction of a new eight-to-ten lane underground expressway through downtown Boston; and construction of a new four lane tunnel under Boston Harbor connecting the Massachusetts Turnpike and the Logan Airport road system. Adding to the complexity of the Project is the fact that three-quarters of the construction will take place underground in a densely populated, urban area. It will also take place in or around existing mass transit systems that are already congested and cannot be taken out of service for any extended period of time during the construction.

Bechtel/Parsons, as Construction Manager of the Artery Project, occupies a role identical to that of petitioner Kaiser Engineers, Inc. ("Kaiser") on the Boston Harbor Project (the "Harbor project") that is the subject of this litigation. In that role, Bechtel/Parsons conducted a thorough analysis of the most cost-effective and efficient way to proceed with this project of unprecedented size and complexity. To ensure uniformity of work rules and to protect the project from strikes, picketing, and other disruptive and delaying effects of labor disputes, Bechtel/Parsons (like Kaiser) negotiated a special labor stabilization, or project, agreement to cover all construction on the Artery project site. And like Kaiser's agreement, Bechtel/Parson's labor contract requires that all contractors on the Artery project become bound to the agreement, recognize the signatory unions and utilize hiring halls. The MDPW, sponsor of the Artery project, included in its bid specifications the labor agreement's requirement that all contractors become bound to the project agreement, just as the Massachusetts Water Resources Authority included this same requirement from

Kaiser's labor agreement in its bid specifications for the Harbor project. Thus, the enforceability of this term of the Bechtel/Parsons' project agreement, together with the implementing state bid specifications, are intimately tied to the validity of the Harbor specifications.

The significance of the project agreement to a construction manager such as Kaiser, Bechtel/Parsons, or NCA members acting in that capacity cannot be overemphasized. By requiring that all contractors become bound, the labor agreement ensures that various work rules and conditions on the project site (for example, shift schedules, break times, travel times, holidays, etc.) will be standardized, thereby eliminating the numerous conflicting practices of individual contractors (whether union or nonunion) that would otherwise be in effect. Without this standardization, coordination of these differing work rules would be extremely difficult (if not impossible) and costly. In addition, both the Harbor and Artery project agreements contain binding grievance/arbitration procedures to resolve the inevitable work and jurisdictional disputes which will occur when thousands of employees, employed by scores of different employers and represented by dozens of different unions, work side-by-side on the same construction project.

But most importantly, the project labor agreement provides a comprehensive no-strike clause shielding against costly delays and disruptions caused by lawful strikes and picketing for the entire life of the project. To appreciate the significance of this no-strike pledge, one need only consider that there are approximately 24 different building trade unions in the Boston area. Each union typically is party to a two- or three-year agreement with contractors working within its trade jurisdiction. Since approximately 75% of major construction in the Boston area is performed by union contractors, the majority of the project contrac-

tors would be party to one of these 24 agreements even in the absence of the requirement of Bechtel/Parsons' (or Kaiser's) project agreement. *Utility Contractors Ass'n of New England, Inc. v. Comm'rs of MDPW*, No. 90-3035, slip. op. at pg. 1-2 (Mass. Super. Ct. August 2, 1990). With 24 contracts expiring every two or three years over the anticipated eight-year duration of the project, there would be between 50 and 100 separate negotiations for new collective bargaining agreements occurring among the contractor workforce. *Id.* Any one of these negotiations could result in a lawful strike delaying the completion of either the Artery or Harbor projects.

It is precisely this eventuality which is protected against by the comprehensive no-strike clauses contained in the Harbor and Artery project agreements. Of course, just as the proverbial chain is only as strong as its weakest link, a construction project's protection from lawful strikes is only as strong as the breadth of its no-strike clause. The ability of a union to lawfully picket and strike even one contractor on a project is often sufficient to bring an entire project to a standstill. Consequently, true protection can only be secured by ensuring that the no-strike pledge extends to *all* project contractors; this can only be accomplished by requiring that *all* contractors on the site become bound to the agreement.

The decision below effectively prevents Kaiser from implementing this significant requirement of its collective bargaining agreement—even though it was part of a labor agreement negotiated by a private sector employer in the construction industry—simply because the owner of the project is the Commonwealth of Massachusetts. Although the court found that the underlying collective bargaining agreement was lawful, it held that the Commonwealth's repetition in its bid specifications of the contract's require-

ment that all contractor's become bound rendered the specifications unlawful. Yet without inclusion in the bid specifications, this part of Kaiser's labor agreement is itself rendered unenforceable.

If the decision below is left undisturbed, Bechtel/Parsons' project labor agreement will be impacted similarly and the right of NCA members to use such Section 8(e) and 8(f) labor agreements on future public construction projects will be brought into serious question. This result is inimical to the best interests of the public entities that own the construction projects, the construction managers that direct them, and the public that must pay for them.

STATEMENT OF THE CASE

Amici adopt the Statements of the Case set forth in the Petitions for Writ of Certiorari, as well as the petitioners' descriptions of the Opinions Below, Jurisdiction, and Constitutional and Statutory Provisions Involved.

REASONS FOR GRANTING THE WRIT

By its 3-2 *en banc* decision, the court below has raised serious questions as to whether Section 8(e) and (f) agreements can be used on public construction projects. For the first time, a practice long-recognized and well-established on construction sites has been called into doubt when applied to a publicly owned construction project simply because, in accordance with state bidding laws, the requirements of a privately negotiated labor agreement applicable to all contractors on that project have been repeated in the project's bid specifications.

As detailed in the following pages, this Court's consideration of the issues raised by the decision below is appropriate because:

(1) the Court of Appeals seriously misapplied the federal pre-emption doctrine as developed by this Court, destroying significant federal rights of public owners, private construction employers, employees, and unions, and

(2) these issues are of critical importance to the management of public construction projects in this country, thus warranting definitive instruction from this Court.

I.

THE DECISION BELOW DISREGARDS CONGRESS' CAREFULLY CRAFTED STATUTORY SCHEME FOR THE CONSTRUCTION INDUSTRY, PERMITTING A "CRAZY QUILT" OF PRACTICES THAT ARE ANTITHETICAL TO THE OBJECTIVES OF THE FEDERAL PRE-EMPTION DOCTRINE.

A. The Court of Appeals' Decision Eliminates Substantial Rights of Construction Industry Employers.

In recognition of the unique needs of the construction industry, the 1959 Congress amended the Act by adding Sections 8(f) and (e). Section 8(f) explicitly authorizes employers in the construction industry—but no other employers—to enter into collective bargaining agreements before the first employee is even hired. These "pre-hire" agreements are permitted to provide for recognition of a union as the bargaining representative of employees; to require employees to pay union dues or equivalents; to obligate employers to use union hiring halls; and to set all other terms and conditions of employment on the construction site. *See NLRB v. Local Union No. 103, Int'l Ass'n of Bridge Workers*, 434 U.S. 335 (1978); *Local 100, United Ass'n of Journeymen and Apprentices v. Borden*, 373 U.S. 690 (1963).

Pre-hire agreements were sanctioned under Section 8(f) to protect the organizational and representational interests of construction unions and employees. Congress recognized that these employees could not effectively rely on traditional representational petitions and elections to unionize because of the nature of employment in the construction industry. *See* S. Rep. No. 187, 86th Cong., 1st Sess. 55-56, *reprinted in* 1 NLRB Legislative History of the Labor Management Reporting and Disclosure Act of 1959 at 451-52 ("Leg. Hist."); *John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), *enforced sub nom. Int'l Ass'n of Bridge Workers v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

Section 8(f) was also enacted to accommodate the unique needs of construction industry employers. Congress viewed pre-hire agreements as critical to the industry for two reasons: employers needed to know their labor costs in advance of bidding on a project and they needed access to a ready supply of skilled craftsmen who could be available for quick referral (through the hiring hall) if they were awarded the job. H.R. Rep. No. 741, 86th Cong., 1st Sess. 19, 1 Leg. Hist. 777.

Congress' 1959 accommodations to employees, unions, and employers in the construction industry went beyond merely authorizing pre-hire agreements and included the addition of Section 8(e). Under this provision, a construction union and an employer are permitted to enter into an agreement that requires all contractors performing work on a particular project site to execute the labor agreement. *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 660 (1982); *Connell Constr. Co. v. Plumbers and Steamfitters Local 100*, 421 U.S. 616, 633 (1975). This practice was an essential part of the "pattern of collective bargaining" in 1959, and Congress intended to preserve this practice through Section 8(e). *Woelke & Romero Framing*, 456 U.S. at 657. Indeed, Congress permitted these "union signatory"

clauses specifically to promote labor harmony and "to alleviate the frictions that may arise when union men work continuously alongside nonunion men on the same construction site." *Connell Constr. Co.*, 421 U.S. at 630 (*quoting Drivers Local 695 v. NLRB*, 361 F.2d 547 (D.C. Cir. 1966)).

The history of Sections 8(e) and (f) indicates that these construction industry accommodations were intended to apply to both public and private construction sites. This history strongly suggests that the pre-1959 pattern of bargaining Congress intended to preserve specifically included the use of Section 8(e) and (f) agreements on public construction projects.

The evidence before Congress in 1959 indicated no significant differences between the bargaining patterns on public and private projects. In congressional hearings held between 1951 and 1959 to assess the need for accommodations to the construction industry, there was testimony detailing the nature of the industry and the existing pattern of industry bargaining. The pattern of bargaining described for public works—the construction of dams, roadways, and bridges—was no different from that described for purely private projects. *See, e.g.*, Hearings Before the Subcommittee on Labor and Labor-Management Relations on S.1973, 82d Cong., 1st. Sess. 27, 29, 31, 35, 39 and 45 ("1951 Hearings"). These discussions of the construction industry drew no distinction between private and public construction projects.

Nor does logic suggest any difference between the treatment of private and public projects. The construction industry employer's need to estimate its costs and secure a ready supply of labor, and the employees' and unions' representational and organizational interests—all objectives served by Sections 8(e) and (f)—do not differ depending on whether the project's owner is a private or public entity.

In light of this, it seems clear that Congress understood that these agreements, which since have become known as standard Section 8(e) and (f) agreements, were a vital part of the public construction fabric in 1959. As such, Congress was as interested in preserving these agreements on public projects as it was on private construction sites because their importance was common to all construction projects.

Under the authority of these statutory provisions, Kaiser negotiated a pre-hire project agreement that required all contractors on the Harbor project site to become bound to its terms. That this agreement was valid and lawful in accordance with the terms of Sections 8(e) and (f) was recognized expressly by the court below. Yet in the very next breath, the Court of Appeals rendered that precise requirement unenforceable.

Like most pre-hire construction agreements, Kaiser's contract has the core requirement that all contractors on the Harbor project become bound to the agreement for work performed on that specific project. Without the uniformity provided by this requirement, the primary benefit of project stability is lost. On a privately owned project, the contract between Kaiser and the unions, including its requirement that all site contractors execute the agreement, would simply be implemented by Kaiser's direct contracting authority, *i.e.*, its insistence that successful bidders for project work execute its project labor agreement if they wished to be awarded the work. Similarly, on publicly owned projects where the construction manager contracts directly with all major project contractors and it is not necessary for the municipal or state owner to execute direct agreements with these contractors, the same project labor agreement requirement could be implemented by Kaiser's insistence that successful bidders for project work execute the project labor agreement. In both cases, there would be no question that the underlying project labor agreement generally, and its specific requirement that

all other contractors on the site execute the labor agreement as the *quid pro quo* for the receipt of project work, would be lawful under Sections 8(e) and (f). *See Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 270, n. 9 (1983).

Because of the complexity of the Harbor project and the requirements of the Massachusetts' bidding laws, the Commonwealth had to let major contracts directly to project contractors. This resulted in the Commonwealth adhering to the formality of individually contracting with each entity performing major work on the site. In addition, the essential requirements for working on the project had to be contained in the Commonwealth's bid specifications. In this instance, that meant including in the specifications the requirement of Kaiser's labor contract that all project contractors must become bound to that labor agreement. The court below found that, by so complying with state law and by merely including the requirements of Kaiser's project labor agreement in the specifications, the Commonwealth's specifications were unlawful as an impermissible state intrusion into labor matters affecting prospective project contractors.

Necessarily following from the decision below, although never addressed by the court, is the fact that this core provision in Kaiser's project labor agreement is rendered unenforceable by the court's decision. Because Kaiser cannot contract directly with project contractors, it also cannot directly implement its mandate that all other contractors become bound to its labor agreement, something which is critical to the agreement's purpose and success. The only mechanism available under these state-required contracting limitations for implementing this mandate is the Commonwealth's bid specifications. By invalidating the specifications, a key provision of the agreement itself was rendered unenforceable and Kaiser was denied its rights under Sections 8(e) and (f). This occurred even though all five of the judges below agreed that the project agreement was lawful.

B. The Court of Appeals' Decision Establishes Form, Rather Than Substance, As The Touchstone For Federal Pre-emption, Creating A Patchwork Result Contrary To The Objective of Uniformity Underlying The Pre-emption Doctrine.

As this Court has stated in other contexts, federal pre-emption is to be based upon the substance of state regulation and not the form it takes. Most often this has caused courts to find various state actions pre-empted because substantively they impermissibly impose on federal labor policy, even though in form they do not purport to regulate labor matters at all. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985) and *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 614, n.5 (1986). The decision below ignores this basic principle by applying pre-emption based on the form of state action rather than its actual substance.

The "state's intrusion" into labor matters as found by the court below is not the *state's* intrusion at all. The contested requirement referenced in the bid specifications (*i.e.*, that all contractors become bound to Kaiser's labor agreement) was not independently imposed by the Commonwealth but rather was merely a repetition of the requirement contained in the private labor agreement negotiated by the project's construction manager, Kaiser. Substantively, the labor agreement and all its requirements—including those contested here—belong to Kaiser, not to the Commonwealth.

That these requirements are repeated in the Commonwealth's bid specifications is a matter of form not of substance. For reasons completely unrelated to labor relations or policy, each major contract let on the Harbor project must be let through direct contract with the Commonwealth and not with the project's construction manager; the bid specifications for each portion of the work must include notice of

the appropriate requirements in order for those requirements to be enforced. In this case, the appropriate requirements are the provisions of the private labor agreement between Kaiser and the unions, and the contested bid specifications do no more than provide the necessary notice of the contract's requirements to interested bidders.

The mixed results created by the decision below provide an enlightening illustration of why this Court has always held that substance, and not form, must govern in the pre-emption arena. Under the First Circuit's analysis, this same project agreement would, presumably, be valid and fully enforceable on this same project if Massachusetts had simply permitted Kaiser to implement its labor agreement by contracting directly itself (Kaiser) with all project contractors, thus obviating the need for the bid specification. Similarly, if, in order to implement the labor agreement's mandate that all project contractors become bound to that agreement, Massachusetts law did not require it to be included in the specifications, the issue of pre-emption would not have arisen. Each of these situations is substantively identical to the circumstances of this case. The only difference lies in the form required for implementation of the Kaiser labor agreement.

What emerges from this decision, in the words of dissenting Chief Judge Breyer, is the possibility of creating an "odd crazy-quilt of pre-hire practices." Depending solely upon the peculiar bidding law requirements, or practices, of various states and municipalities, what might be lawful on one public construction project might well be unlawful, as "pre-empted," on another. The irony is that it is precisely to avoid such an "odd crazy-quilt" that the doctrine of federal labor pre-emption exists. *See Amalgamated Ass'n of Street, etc. v. Lockridge*, 403 U.S. 274, 285-88 (1971) and *Garner v. Teamsters, Chauffeurs and Helpers, etc.*, 346 U.S. 485, 490-91 (1953).

Perhaps the ultimate irony, however, is that most project contractors would likely be confronted with the requirement that they comply with union labor agreements even in the absence of the contested bid specifications. Many of the contractors with which the Commonwealth contracts directly for major pieces of the construction process are themselves signatories to Section 8(f) labor agreements that contain provisions authorized by Section 8(e). These contractors' individual labor agreements therefore would restrict their subcontracting to employers who agree to become bound to their individual labor agreements. This is the very "evil" the court below sought to avoid. And because it will be accomplished through a pre-hire agreement, with a Section 8(e) sanctioned contracting clause but without the support of a bid specification, the result will be immune from pre-emption attack and unquestionably lawful.

Thus, under the decision below, most project contractors would still be subject to union agreements, but they—and the public—would not have the benefits of the project agreement. While second tier contractors would have the same hiring hall and union recognition requirements that the First Circuit majority found offensive, the project would be denied the protection of the comprehensive no-strike clause and uniformity of work rules that Kaiser, through its greater bargaining leverage, was able to extract from the unions in the project agreement. From the viewpoint of the public, which must pay for this project, this is the worst of two worlds.

C. The Decision Below Fails To Advance Any of the Objectives of the Federal Pre-emption Doctrine.

Federal labor pre-emption exists to avoid conflict between state and federal policy and to advance the congressional determination that some matters of labor policy were intended to be left unregulated, *i.e.*, to be controlled by

"the free play of economic forces." *See Golden State Transit Corp.*, 475 U.S. at 614 (*quoting Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1986)).

Neither of these objectives is served here. It is readily apparent that the contested state action—the Commonwealth's inclusion of the Kaiser project labor agreement requirement in its bid specifications—in no way conflicts with federal labor policy. The alleged wrong—requiring all project contractors to become bound to this agreement regardless of their own labor policies—is completely consistent with explicit federal labor policy. *See Woelke & Romero Framing*, 456 U.S. at 663; *Jim McNeff, Inc.*, 461 U.S. at 270 n. 9.

Nor does the Commonwealth's inclusion of the requirements of the Kaiser contract in its bid specifications impose "regulation" where Congress intended there to be none. The decisions cited above demonstrate unequivocally that bargaining in the construction industry, insofar as it relates to pre-hire agreements and contracting clauses, is not unregulated, but is heavily regulated by Sections 8(e) and (f). And "implicit in the construction industry proviso" of Section 8(e) is the understanding that this regulation includes acceptance of a union contract as the *quid pro quo* for securing project work. *Id.*

Thus, by including the requirement of Kaiser's labor agreement in its bid specifications, the Commonwealth did not affect the intended extent of that regulation. The standard articulated by this Court in *Golden State Transit Corp.* is that state regulation is prohibited "*unless* such [regulation] presumably were contemplated by Congress." 475 U.S. at 614-15 (emphasis added). The "regulation" contested here was clearly contemplated and explicitly authorized by Congress.

The most obvious effect of the decision below, in refusing to recognize that the contested state action was entirely consistent with, and in furtherance of, explicit federal labor policy, is to create a *per se* rule of federal pre-emption: any and all state action that touches upon labor matters is pre-empted. Such a rule, however, is flatly contrary to the teachings of this Court. *See, e.g., Golden State Transit Corp.*, 475 U.S. at 616 (finding pre-emption only when the state has "'[entered] into the substantive aspects of the bargaining process *to an extent Congress has not countenanced*,'" *quoting Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 149 (1976) (emphasis added)).

II.

THE FACTS OF THIS ACTION PRESENT UNIQUE ISSUES THAT CRY OUT FOR FINAL RESOLUTION AND INSTRUCTION BY THIS COURT.

The questions raised by the Court of Appeals' erroneous decision in this action are of critical importance. In 1990, public construction accounted for approximately 25% of all new construction put into place in this country, with a value in excess of $109 billion. [U.S. Department of Commerce, International Trade Administration, *Construction Review, a Bimonthly Industry Report*, March/April 1991, at pp. 1 and 7]. As America's infrastructure undergoes its much needed reconstruction in the coming years, public construction projects will take on even greater importance. And with them, pre-hire agreements and Section 8(e) contracting clauses to help ensure labor stability leading to timely project completion will have an even greater value. As the states are confronted with the enormous task of rebuilding our nation's roads and bridges, it is critical that their projects not be excluded from the benefits and protections of Sections 8(e) and (f).

It is, or should be, equally apparent that the important issues raised by this litigation require a definitive resolution. As the petitioners make clear, pre-hire project agreements—including agreements containing union only contracting provisions—are a way of life in the construction industry on both public and private projects. The brief of the Building and Construction Trades Council of the Metropolitan District offers an impressive, albeit incomplete, listing of public projects for which project agreements like the one in issue here are commonplace. These agreements, including union-only contracting provisions, are so frequently found for two basic reasons: (1) they are believed to promote cost effective, efficient and timely completion of construction projects, particularly by avoiding the costs of construction delays caused by strikes and labor disputes; and (2) they have always been considered by both employers and unions in the construction industry to be equally lawful and enforceable on public and private construction projects. While recent events have done nothing to call into question the first rationale for their use, the second has been seriously undermined by the First Circuit's decision.

Guidance and instruction from this Court are necessary because the resolution of these critical issues are far from self-evident from the First Circuit's decision. Not only have the contractors, unions, and municipalities (and their counsel) on the above-referenced public projects apparently been confused by these difficult issues, but the federal courts have been unable to agree among themselves on the proper resolution of these questions. Over the last six months, these same questions have been addressed by ten federal judges sitting on four different courts. If one were simply counting votes, these issues would be unresolved due to an even split of opinion: five of these judges have found the federal pre-emption doctrine applicable, barring the

contested governmental specifications; five have found federal pre-emption *not* applicable and would allow these specifications.[2]

And there is good reason for this uncertainty. While the amici agree fully with the substantive arguments raised by the petitioners seeking certiorari, they also recognize that the pre-emption issues presented here do not fit squarely into any of the several pre-emption cubbyholes this Court has crafted over the years. The involvement of a public project owner and the interplay of its bidding laws, the state's role as a consumer rather than as a regulator; and the absence of any specific on-going labor dispute all add significantly to the novel nature of these issues. These facts do not permit, for example, the simple application of *Garmon* pre-emption or a reactionary rejection of the *Machinists* doctrine; rather, they call for an analysis of pre-emption not before provided by the Court.

As this Court well knows, the doctrine of federal pre-emption is constantly evolving, with almost every term yielding another piece in this complex puzzle. The facts of this case provide the Court with another opportunity to provide needed refinement and clarification of this doctrine in a context which will have a significant and immediate

[2]Besides the First Circuit, which split three to two in favor of preemption, other courts considering these same issues in recent months are the U.S. Court of Appeals for the Eight Circuit (two to one in favor of preemption), *Glenwood Bridge, Inc. v. City of Minneapolis*, No. 91-1442, slip op., 137 L.R.R.M. 3001 (8th Cir. August 2, 1991), and the U.S. District Court for the Eastern District of Tennessee (rejecting pre-emption on the basis of DOE involvement), *Phoenix Engineering, Inc. v. MK-Ferguson of Oak Ridge Co.*, No. Civ-3-90-839, slip op. (E.D. Tenn. March 22, 1991). In addition, the U.S. District Court for the District of Alaska, Judge Kleinfeld, has held in an oral opinion that a similar arrangement on a public project was not pre-empted. *ABC v. City of Seward*, No. A91-001 Civil, oral decision (D. Alaska March 19, 1991).

impact on this nation's construction industry for years to come.

CONCLUSION

For the foregoing reasons, we urge the Court to grant the Petitions for Writ of Certiorari.

Dated: September 10, 1991

Respectfully submitted,

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